WHY HAS VOCATIONALISM PROPAGATED SO SUCCESSFULLY WITHIN AUSTRALIAN LAW SCHOOLS?

*Dr Nickolas John James**

ABSTRACT

Vocationalism is an approach to the teaching of law which emphasises the inculcation of practical legal skills and the enhancement of the employability and efficiency of the law student as future legal practitioner. It is an approach which is apparently widespread but which is also frequently questioned and criticised. This paper seeks to determine how and why vocationalism has propagated so successfully within Australian law schools.

The success of vocationalism is contingent upon the widespread expectation that tertiary education should lead to employment, the rise of corporatism within university management, the significant pressure exerted by employers to make the law degree more practical, and the pressure exerted by government agencies to produce employable graduates. As an expression of power-knowledge within the law school, vocationalism privileges particular types of law teacher and law school, and seeks to achieve the creation of a productive legal workforce through the deployment of a range of disciplinary strategies.

I INTRODUCTION

There is a widespread belief within Australian law schools that, regardless of the pedagogical, political, social and cultural contexts and consequences of the teaching of law, the primary purpose of legal education – the 'bottom line' – is to train law students to be lawyers. It is often claimed that the traditional law course is inadequate in that it is unrealistic and impractical, that there is often too much emphasis upon learning legal theory and insufficient emphasis upon learning legal skills, and that these deficiencies must be addressed if Australian legal education is to remain relevant and effectual. This set of notions,

* BCom LLB (Hons) LLM PHD. Lecturer, T C Beirne School of Law, University of Queensland. This paper is part of a larger project analysing power-knowledge in Australian legal education. I am grateful to the following colleagues for their feedback regarding this project: Dr Helen Stacy at Stanford University; Dr Barbara Hocking and Dr Sally Sheldon at Queensland University of Technology; and Dr Bill McNeill at Griffith University.

referred to collectively in this paper and elsewhere as 'vocationalism', is typically portrayed and often accepted as one of the fundamental truths of contemporary, post-Pearce legal education.

Vocationalism is a historically and culturally specific discourse. It is a legal education discourse which was prevalent during the 19th and the early part of the 20th centuries, which was subsequently marginalised by doctrinalism and liberalism, and which since the 1980s has re-emerged as a credible approach to the teaching of law. It is a discourse which was, and is, frequently contested and criticised. The 2003 Johnstone Report, for example, quoted one senior law academic who claimed that the relationship between the legal profession and law schools has become too close:

> We've acceded absolutely. We've tugged the forelock to the profession, and I think this is another reason for actually dumbing down what's happening within the law schools now by again, subsuming the PLT [Practical Legal Training] within the curriculum. Well theoretically one might talk about teaching of skills clinically and so on. In practice that's just not the case. I mean it's basically what I call a 'how to' approach and I don't wish to sound superior about the profession but I do think the university is a different exercise, has a different value system and the notion of critique and questioning is crucial, whereas in the profession you're not supposed to do that ... Which is why law has actually had quite a low reputation within the academy because it has been seen, not as education but as training, vocational training, that it is simply accepted there are certain values and certain skills that have to be taught and that's it. That one isn't free in that sense as other areas of the Humanities and Social Sciences. I think someone's talked about a sort of relationship with feudalism between the law school and the legal profession and that we owe this fealty and until we actually break that, sever that, then we will not really be an intellectual discipline within the university.[1]

There are many legal scholars who would agree with these sentiments. Anthony O'Donnell and Richard Johnstone, for example, criticised vocationalism when they wrote that '[t]he academic study of law [is] a serious endeavour in itself, rather than merely ... a training ground for future lawyers'.[2] Judith Lancaster similarly argued that 'responsible universities have an obligation to develop something more in students than profit making acumen'.[3] Ian Duncanson expressed concern that the rising influence of vocationalism would eclipse the academic study of legal phenomena from sites other than those selected by and for

1 Richard Johnstone and Sumitra Vignaendra, Learning Outcomes and Curriculum Development in Law (Canberra: Australian Universities Teaching Committee, Department of Education, Science and Training, 2003) 161.

2 Anthony O'Donnell and Richard Johnstone, *Developing a Cross-Cultural Law Curriculum* (Sydney: Cavendish Publishing, 1997) 2.

3 Judith Lancaster, 'In Favour of an Integrated Approach to the Teaching of Ethics to Business Law Students' (2001) 3 *University of Technology Sydney Law Review* 174, 174.

lawyers [4] Numerous liberal, interdisciplinary and critical legal scholars have expressed similar views [5]

This paper seeks to determine how and why vocationalism persists despite such apparent resistance In doing so, it is not suggested that law schools are wrong to emphasise employability or that law courses should not incorporate the teaching of legal skills into the degree This paper seeks neither to prove nor disprove vocationalism's claims; it is, instead, an analysis of vocationalism as a vector of 'power-knowledge'.

Michel Foucault coined the term 'power-knowledge' to indicate the close relationship between knowledge and power: the production and dissemination of knowledge is always an expression of power, and the expression of power always involves the production and dissemination of knowledge [6] Discourses designate the conjunction of power and knowledge: it is through discourses that the production of knowledge takes place and through which power is exercised and power relations are maintained [7] Discourses seek to both inform and influence, to both educate and dominate Discourses tell subjects about themselves and about the world; they also construct that world and determine who the subjects are A legal education discourse, then, is both a form of knowledge about the teaching of law and an expression of power seeking to influence the thoughts and behaviours of law teachers, law students and others Each legal education discourse is in perpetual competition with other discourses; knowledge within the discipline of law is consequently inconsistent, discontinuous and unstable, and rather than working together for the betterment of legal education as a whole, legal scholars disagree, compete, and propagate ideas that further their own interests and accord with their own belief systems In this regard legal education is not unique: there are multiple discourses within every

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4 Ian Duncanson Legal Education Social Justice and the Study of Legality (1990) 10 *University of Tasmania Law Review* 16, 16

5 Non-legal scholars have also been concerned with such issues for a very long time Cardinal John Henry Newman in his book *The Idea of a University*, first published in 1852, acknowledged that the training of professional people came within the function of a university but insisted that the education of the intellect was the essential function of a university: John Henry Newman *The Idea of a University Defined and Illustrated I In Nine Discourses Delivered to the Catholics of Dublin II In Occasional Lectures and Essays Addressed to the Members of the Catholic University* (London: Longmans Green 1889); See also Huston Smith, *The Purposes of Higher Education* (New York: Harper 1955); Jacques Barzun, *The House of Intellect* (New York: Harper 1959)

6 Foucault did not suggest however, that power and knowledge are the same thing Many believe that Foucault insisted that 'power is knowledge' or that knowledge is power but, as Foucault remarked if they were the same thing it would have been a waste of most of his scholarly life to analyse their relation: Gavin Kendall and Gary Wickham *Using Foucault's Methods* (London: Sage Publications, 1999) 51

7 Michel Foucault *The Will to Knowledge The History of Sexuality 1* (London: Penguin 1998) 101

discipline, and disciplines are characterised not by a simple, consistent worldview but by the tension which exists between various perspectives, politics and positions. Legal education in Australia is characterised by the tension between doctrinalism, vocationalism, liberalism, and various critical and feminist discourses. Each of these discourses has something different to say about the nature of law and legality and about the nature, purpose and scope of legal education.

The first part of this paper is an analysis of vocational legal education discourse as a form of knowledge. The (re)emergence and success of vocationalism-as-knowledge within Australian legal education are the consequences of a set of historical, political and cultural contingencies including the widespread expectation that tertiary education should lead to employment, the rise of corporatism within university management, the significant pressure exerted by employers to make the law degree more practical, and the pressure exerted by government agencies to produce employable graduates.

The second part of this paper is an analysis of vocationalism as an expression of power within the law school. Vocationalism seeks to ensure that legal education is primarily the training of skilled legal practitioners. The creation of an efficient, productive and obedient work force benefits employers and the interests of the wider community as perceived by corporatist government agencies. In seeking to achieve its objectives, vocationalism employs certain strategies including compliance with legal practice admission requirements, the maintenance of close relations between the law school and employers, and the offering of PLT courses. Vocationalism is an effort to ensure that legal education is an efficient and effective mechanism within the wider social disciplinary structure.

II VOCATIONALISM AS KNOWLEDGE

A *The Nature of Vocationalism*

Vocationalism is the set of statements about legal education produced by law schools and by legal scholars which emphasise the importance of the teaching of legal skills and prioritise employability as an objective of legal education.

Most Australian law schools in their promotional texts emphasise the close connections between the school and the professional legal community, the teaching of legal skills within the degrees offered by the school, and the employability of the school's graduates. The University of Adelaide Law School, for example, advises prospective students that the LLB 'incorporates in the degree a number of Legal Skills focussed subjects, taught closely in conjunction with mainstream substantive subjects', and that 'many members of the Law School have active and

prominent associations with the practising legal profession and the broader legal community'.[8] Graduates from Griffith University Law School 'can look forward to high employment rates and high starting salaries', and the Law School 'places a heavy emphasis on the practical and generic skills of lawyering'.[9] The Northern Territory University School of Law emphasises vocationalism by providing 'a solid theoretical and practical general legal education that well prepares students for professional practice' and by maintaining 'close contact with members of the practising legal profession'.[10] The University of Notre Dame College of Law LLB was 'designed as highly practical qualification in Law by some of Western Australia's leading legal practitioners. It is a Law degree made by lawyers for lawyers'.[11]

Regardless of their self description, every Australian law school offers at least some vocational law subjects or programs. Many compulsory and elective law subjects are described as focussing upon general legal skills, or upon specific legal skills such as legal research, legal reasoning, drafting, dispute management, advocacy, trust accounting, interviewing, legal practice management, computing skills, law clinics, moot programs, internship programs and PLT programs. All of these are concerned, at least peripherally and often primarily, with the inculcation of practical skills and training for legal practice. According to the Johnstone Report, the infusion of legal skills education and training into LLB programs has been the biggest change in law school curricula over the last decade.[12] The Report gave examples of four approaches to the incorporation of legal skills into the curricula: a minimalist approach; a more explicit approach where there are dedicated skills law subjects, modules within law subjects, clinical programs and placements; carefully planned incremental, integrated and co-ordinated skills programs spanning the LLB degree program; and the inclusion of fully-fledged professional legal training programs within LLB programs. The report concluded that most schools have adopted the second of the four approaches, none of the law schools have ignored legal skills altogether, and an increasing number of schools have either adopted the fourth approach or are thinking about doing so.[13]

There are many works of Australian legal education scholarship which explicitly advocate a vocational approach to the teaching of law. Some

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8 University of Adelaide, *The Law School* <http://www.law.adelaide.edu.au/> at 14 May 2003.

9 Griffith University, *Griffith Law School* <http://www.gu.edu.au/school/law/home.html> at 19 March 2003.

10 Charles Darwin University, *School of Law* <http://www.ntu.edu.au/lba/law/index.htm> at 29 May 2003.

11 University of Notre Dame Australia, *College of Law* <http://web.nd.edu.au/acadc/law/index.shtml> at 9 May 2003.

12 Johnstone and Vignaendra, above n 1, 166.

13 Johnstone and Vignaendra, above n 1, 166.

texts focus upon the importance of and the methodology for teaching legal and generic skills to law students Others describe the design or the teaching of clinical legal education or PLT programs According to many of these texts, the primary purpose of legal education is to train students to become competent future lawyers or future employees with useful legal skills That competence is justified as benefiting the student in terms of enhanced employability, the employer in terms of enhanced productivity, or the community in terms of enhanced efficiency in the administration of justice. In any event, the emphasis is upon the ability to *do* law. Greg Vickery, for example, wrote in his article 'The Legal Profession and the Expansion of Law Schools in Australia':

> It has increasingly been recognised that undergraduate education should encompass at least some legal skills training which was largely ignored by traditional law schools apart from the limited practical skill of mooting
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> This has greatly assisted in overcoming what I have perceived to be a major difficulty with law schools in the past: that law graduates traditionally had considerable difficulty in adapting their substantive legal knowledge to the working environment The lack of clinical skills in the past has in my view reduced the new graduate s level of effectiveness in the first year of practice while at the same time undermining their confidence to some degree [14]

The implications of this and other such texts are clear: law students inevitably enter legal practice, or at least do legal work, and therefore need certain skills in order to enhance their 'effectiveness' It is the role of the law school to inculcate this effectiveness within law students, and to ensure that graduates are ready to enter the legal workforce and to contribute to the profitability of their employers and to the efficacy of the legal system. Education is a process of training, and a student has successfully learned the law when they can competently exercise practical legal skills. Legal education is about learning the law, but it is also about learning how to apply the law The highest truth and knowledge about law and legal education is produced by the legal profession and by those who act in the best interests of the legal profession. Students must learn to 'think like a lawyer' and to 'do like a lawyer' [15] Doctrinal knowledge alone is too theoretical and unrealistic, and must be supplemented by practical knowledge – how the law 'really works'

This distinction between knowing and doing is evident in the use of the word 'real' within many vocational texts. When legal skills and legal

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14 Greg Vickery, The Legal Profession and the Expansion of Law Schools in Australia in John Goldring Charles Sampford, and Ralph Simmonds (eds) *New Foundations in Legal Education* (Sydney: Cavendish Publishing 1998) 212, 213-214.

15 Charles Brabazon and Susan Frisby Teaching Alternative Dispute Resolution Skills in Charles Sampford, Sophie Blencowe, and Suzanne Condlln (eds) *Educating Lawyers for a Less Adversarial System* (Leichhardt: The Federation Press, 1999) 156 167

practice are contrasted with legal doctrine and legal theory, the former are often explicitly described as 'real', and the latter, by implication, as 'not real' La Trobe University Law School, for example, describes itself as providing 'many opportunities for clinical work in *real* practice situations and for acquiring oral and professional skills'[16] The Queensland University of Technology School of Law claims that 'many staff are extensively involved in a range of other '*real* world' activities with professional leaders, law firms, refereed and professional journals and in the delivery of continuing professional education activities'[17] A basic theme of the law subject LLB222 *Perspectives on Law* at the University of Wollongong is 'the underlying tension between law as an abstract medium of scholarship and the way it operates in *real* life'[18] In her paper 'Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia', Margaret Castles argued that 'the process of learning legal ethics should take place during the undergraduate period of study in a way that exposes students to the *real* as well as to the theoretical dimensions of legal ethics'[19]

Legal doctrine and legal theory are, according to vocationalism, too abstract In order to truly understand the law, one must experience the law, particularly from the perspective of the legal practitioner. Hence the view promulgated by many law schools that a law degree is enhanced by the input of practising lawyers The University of Adelaide Law School, for example, claims that '[m]embers of the practicing legal profession and the judiciary make active contributions through teaching and administration to the Law School, as well as maintaining personal associations'[20] Similarly, the University of Canberra School of Law claims that

> [t]he majority of lecturers have significant legal practice experience and work hard to maintain close links with the legal profession government and industry We also consult regularly and often with the profession to ensure that our course remains up-to-date relevant and challenging [21]

The view that law is something which is done rather than simply known is also evident in the emphasis placed by vocational texts upon the inculcation of legal skills Many vocational legal education texts attempt to comprehensively list and describe the skills which a law student must

16 La Trobe University *La Trobe Law* <http://www latrobe edu au/law/> at 27 March 2003 (Emphasis added)

17 Queensland University of Technology *Faculty of Law* <http://www law qut edu au/> at 8 May 2003 (Emphasis added)

18 University of Wollongong *Faculty of Law* <http://www uow edu au/law> at 22 April 2003 (Emphasis added)

19 Margaret Castles Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia (2001) 12 *Legal Education Review* 81 81 (Emphasis added)

20 University of Adelaide, above n 8

21 University of Canberra School of Law <http://www dmt canberra edu au/law/default htm> at 15 May 2003

be taught during their legal education. Regarding the practice of compiling lists of legal skills, William Twining wrote:

> It is very doubtful whether compiling lists of discrete skills which practitioners say they think are important goes very far in the direction of a sound sociology of law ... the outcome to date seems to be longer and longer checklists, with little analysis of interconnections, and only rather primitive efforts at setting priorities. The almost inevitable result is the sacrifice of detail, depth and transferability to the dragon of coverage – in this case coverage of longer and longer lists in the name of a mechanistic form of bureaucratic rationalism that is threatening to engulf legal education.[22]

Vocationalism, then, is a body of knowledge about the teaching of law which privileges legal practice over legal knowledge and which emphasises the inculcation of legal skills with a view to enhancing the employability of students. As a body of knowledge, vocationalism competes with alternative approaches to the teaching of law such as doctrinalism, which emphasises the transmission of abstract legal rules and principles; liberalism, which emphasises the inculcation of liberal values such as rationality, individuality and ethical responsibility; and radicalism, which emphasises the exposure of the implicit gendered and cultural biases within law and legal institutions. Why has vocationalism, in the last few decades at least, competed so successfully?

B *Contingencies*

In colonial Australia, new lawyers were trained in the workplace by more experienced practitioners in accordance with the formal apprenticeship model developed in Britain. Concern within the community about the ability, competence and respectability of the colonial lawyers eventually led to a recognition of the need to improve the image of the profession, and steps were taken to shift responsibility for professional legal education from the profession itself to the universities.[23] The legal profession, however, still controlled the content of the curriculum. Law teachers were often practitioners appointed to the university on a part-time basis, and law students typically studied part-time while completing articles of clerkship.[24] The discipline was accorded a relatively low status by other scholars, and the law schools 'were generally viewed as adjuncts to the legal profession rather than truly academic institutions dedicated

22 University of Canberra, above n 21.

23 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in 19th Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111.

24 Dennis Pearce, Enid Campbell and Don Harding, Australian Law Schools: *A Discipline Assessment for the Commonwealth Tertiary Education Committee* (Canberra: Australian Government Publishing Service, 1987) 3-4.

to liberal educational aims.[25] It was not until the rise of the full-time academic lawyer after World War II that the dominance of vocationalism began to wane.

For many years vocationalism was marginalised and suppressed by doctrinalism and liberalism, but in the 1980s and 1990s it re-emerged as increasingly influential upon the discipline. This re-emergence was facilitated by a growing insistence by employers that the teaching of law include training in legal skills. This insistence impacted upon the law school both directly, through appeals by practitioners to law schools and law teachers, and indirectly through the work of such bodies as the Australian Professional Legal Education Council. Employers complained about the lack of skills training within legal education, that there were many skills a law student needed to learn which were ignored in the traditional law school curriculum, and that legal education was deficient if graduates could not practise law when they finished their law degree and entered employment. According to the Johnstone Report, these complaints continue today:

> [M]ost employers interviewed expressed similar views to each other about the emphasis given in the LLB to practice-related skills - they thought it was insufficient. This view was held even by those interviewees who had no other criticisms of the LLB. Most commonly, interviewees thought there was not enough of an emphasis on communication skills and team work. Employers from commercial law firms were furthermore dissatisfied with law graduates' lack of business-related skills and thought that most law graduates could not 'hit the ground running'.[26]

The response by many academic lawyers to these complaints is to the effect that training for legal practice is not the purpose of legal education, and that skills training is the purpose of articles of clerkship and PLT courses.[27] Nevertheless the complaints by employers persist, and these complaints are heeded by a growing number of academics within the law school who favour the incorporation of the teaching of practical skills into university legal education.

This apparent willingness amongst many law teachers to defer to the profession is another factor which contributes to vocationalism's success. The inclusion of both generic and legal skills into the curriculum has proven to be relatively straightforward and generally acceptable to many Australian law teachers. One Head of School was quoted to this effect in the Johnstone Report:

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25 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 711.

26 Johnstone and Vignaendra, above n 1, 246.

27 Charles Sampford and Sophie Blencowe, 'Context and Challenges of Australian Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds) *New Foundations in Legal Education* (Sydney: Cavendish Publishing, 1998) 1, 9.

> I suppose our overall practical orientation is to some extent profession driven, although it's partly driven by the students who are in expectation of joining the profession Our role in the community is to train lawyers and we have a social obligation to do that reasonably well The relationship is extremely positive and extremely good So consequently if we detected the profession are concerned about something naturally we would react to it. They haven't been particularly concerned about or expressing a dissatisfaction about, anything since I've been here and as far as I know they weren't particularly concerned about anything So they're satisfied with our product and our approach. If they're satisfied we're happy because they're important to us [28]

Why do so many law teachers appear to be willing to defer to the legal profession? One explanation may be that law teachers are, like many non-lawyers, mesmerised by the social and cultural prestige of the legal practitioner, a deference exacerbated by the growing pay differential between the teacher and the practitioner. Another explanation is that many law teachers are themselves legal practitioners who seek to unite the pedagogical and practical sides of their careers More pragmatically, the taking of a vocational approach to the teaching of law offers benefits to law teachers both in term of ease of delivery and in terms of perceived quality of teaching. A law teacher's burden is often lightened when it becomes acceptable if not commendable to invite practising lawyers to contribute to course development and delivery [29] The application and contextualisation of legal doctrine with legal practice is also claimed to have the potential to improve student learning, a factor influential upon those law teachers supportive of good teaching practice. In 'Throwing Students in the Deep End, or Teaching Them How to Swim?', for example, Sally Kift and Geoffrey Airo-Farulla identified two main reasons for an increased emphasis on skills development in teaching law [30] The first was compliance with employer demands. The second, more significant, reason was the importance of practical skills training to the effectiveness of student learning as propounded by recent developments in cognitive theory [31]

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28 Johnstone and Vignaendra above n 1, 229

29 On the other hand Johnstone and Vignaendra observed that the increasing use of casual tutors within law schools significantly contributed to the workload of full time academics: Johnstone and Vignaendra, above n 1, 332-334

30 Sally Kift and Geoffrey Airo-Farulla, Throwing Students in the Deep End or Teaching Them How to Swim? Developing Offices as a Technique of Law Teaching (1995) 6 *Legal Education Review* 53

31 Kift and Airo-Farulla quoted Resnick: Current cognitive theory emphasises three interrelated aspects of learning that together, call for forms of instructional theory very different from those that grew out of earlier . psychologies First. learning is a process of knowledge construction, not of knowledge recording or absorption Second, learning is knowledge-dependent; people use current knowledge to construct new knowledge Third learning is highly tuned to the situation in which it takes place Lauren B Resnick, Introduction in Lauren B Resnick (ed) *Knowing. Learning and Instruction* (Hillsdale: Lawrence Erlbaum 1989) 1

Another contingency supporting vocationalism is the pressure exerted by law students There is a widespread expectation amongst law students and within the wider community that education lead to employment, an expectation itself contingent upon both the rising cost of education and the rising fear of the consequences of unemployability. Prospective law students are increasingly concerned to ensure that their choice of degree will lead to a job, and this puts pressure upon the law school to offer a legal education with a vocational emphasis The Johnstone Report quoted one law student who expressed this student expectation as follows:

> [F]inding a job is not just necessary it s essential None of us - well no-one I know - is like the dilettante of previous centuries who go to university for something to do to improve the mind I think nowadays there are many ways of improving the mind We're all mainly studying Law to become solicitors to learn a set of skills which will help us function as solicitors [32]

Those law schools which ignore this pressure fail to attract students As John Goldring observed in 'Tradition or Progress in Legal Scholarship and Legal Education':

> [M]any law teachers . believe that they have an obligation to their students not to depart too radically from accepted modes of legal education For some, this is because they consider that their task is to provide the students with what the students expect: a course of studies which will be the basis for a career in legal practice Others fear that if they do not students will not seek to enter their law schools [33]

Similarly, Andrew Goldsmith argued in 'Standing at the Crossroads' that

> greater student self-consciousness about employment prospects and the various factors contributing to a more conservative student body threaten to increase rather than temper or substantially reduce previous levels of vocationalism within law schools [34]

Graduate destination surveys conducted in the early 1990s appeared to show that more and more law students were electing not to practice law The finding that only half of Australian law students ended up in legal practice became an oft-quoted statistic Some commentators responded by arguing that this should not influence the character of legal education, and that it should still be about learning what it is that lawyers do Others pressed for a 'wider' form of vocationalism: the law degree should still be practical and skills based, but it should also acknowledge that those skills will be applied not only in professional legal practice but also in other

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32 Johnstone and Vignaendra above n 1, 269

33 John Goldring Tradition or Progress in Legal Scholarship and Legal Education in John Goldring Charles Sampford, and Ralph Simmonds (eds) *New Foundations in Legal Education* (Sydney: Cavendish Publishing 1998) 27, 47

34 Andrew Goldsmith Standing at the Crossroads: Law Schools Universities Markets and the Future of Legal Scholarship in Fiona Cownie (ed) *The Law School Global Issues Local Questions* (Aldershot: Ashgate Publishing Limited 1999) 70

occupational settings[35] A 1998 study by Vignaendra subsequently concluded that most graduates did in fact gain legal work of some kind[36] The majority of graduates in Vignaenra's study claimed that they were required to have a knowledge of substantive law, legal practice and procedure in order to carry out their work[37] According to Vivienne Brand, the implication of Vignaendra's findings is that 'law schools ignore black-letter law and vocationally-oriented subjects at their cost'[38]

Vocationalism within the law school is exacerbated by rising levels of corporatism within university management structures and within government educational policy. One of the university's principal objectives has become the attraction of fee-paying students. Law schools are encouraged by university Vice-Chancellors, Deans and administrators to embrace vocationalism, offering vocational law subjects at the expense of non-vocational law subjects, and emphasising legal qualifications as a passport to employment.[40] In 1987 the Pearce Report acknowledged the importance of vocationalism in its several recommendations about specific PLT courses and suggestions to law schools about continuing legal education[42] The Pearce Committee claimed that it was the law school's role to prepare graduates for a range of careers in both the private and public sectors.[43] In 1999, the Australian Law Reform Commission concluded that legal education should focus on what lawyers needed to be able to do, rather than on what lawyers needed to know, and recommended that

35 As Christopher Roper in *Career Intentions of Australian Law Students* observed: The range of employment options taken up by law students today points to vocationalism of a broader kind than simply an interest in preparing for legal practice : Christopher Roper, *Career Intentions of Australian Law Students* (Canberra: Australian Government Publishing Service 1995)

36 Sumitra Vignaendra, *Australian Law Graduates Career Destinations* (Canberra: Department of Employment, Education, Training and Youth Affairs 1998) 24

37 Between 70 per cent and 85 per cent in each case: Vignaendra above n 36 xii

38 Vivienne Brand, Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education (1999) 10 *Legal Education Review* 109 137-138.

39 Enrolments in electives with a non-commercial non-practice focus are often small, compared with enrolments in subjects suited to practice in a large commercial law firm When financial constraints are imposed by the university the smaller, non-vocational electives are less likely to be offered or are offered less frequently: Brand above 39, 123

40 According to McInnis and Marginson the laws schools set up during the 1990s were particularly impacted by such pressure from the university to embrace vocationalism; schools like Bond Flinders and Deakin had to fight to establish their marketability in a competitive environment and catering to professional demands in the design of the curriculum was often seen as the most effective way to secure market share: Craig Mcinnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Canberra: Australian Government Publishing Service 1994) 245

41 Pearce Campbell and Harding, above n 24, 857-914

42 Pearce, Campbell and Harding above n 24 282-305

43 Pearce, Campbell and Harding above n 24 58

> in addition to the study of core areas of substantive law university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.[44]

According to Brand, tertiary education policy since 1987 has had the effect of both pressuring law schools to return to or to retain a narrowly vocational approach to the delivery of curriculum, and at the same time pressuring law schools to broaden the curriculum to accommodate a wider range of students with diversified career interests.[45] In either event the emphasis is upon the inculcation of skills and the employability of graduates

III VOCATIONALISM AS POWER

As well as a category of knowledge about the teaching of law, vocationalism is an expression of power which seeks to influence the beliefs and behaviour of subjects within the law school As an expression of power, vocationalism privileges government agencies concerned with the efficient management of the education sector; universities concerned with the marketability and profitability of its faculties and departments; employers concerned with the supply of employable graduates; and those law schools and legal scholars who have allied themselves with vocationalism.

The notion of power adopted in this paper is a Foucauldian one The first point to note about Foucault's notion of power is that it is *non-judgemental*. The word 'power' often has a negative connotation: it is something possessed and used by the powerful at the expense of the powerless, it is used to repress and control, and it distorts truth and knowledge According to Foucault, however, power is not only negative, it is also productive. Power produces subjects and what they do, it produces how subjects see themselves and the world, and it produces resistance to itself Power leads to dominance and hegemony, but power also undermines dominance and hegemony.[46] Legal education texts,

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44 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000). 142

45 Brand above n 38, 137-138 Goldsmith commented similarly on the development in the early 1990s of two parallel, yet contradictory trends: the one for renewed focus on vocationalism. the other for increased theory: Andrew J Goldsmith, An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education (1993) 43 *Journal of Legal Education* 415 416

46 In Truth and Power Foucault wrote: But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression one adopts a purely juridical conception of such power; one identifies power with a law which says no – power is taken, above all, as carrying the force of a prohibition Now I believe that this is a wholly negative, narrow skeletal conception of power, one which has been curiously

including the books and articles written by legal scholars, the papers that they present, law school websites and course descriptions, and even classroom and meeting room dialogues, are all expressions of power seeking to achieve particular objectives This need not be viewed as a controversial assertion if it is understood that designating something as an exercise or as a technology of power is not a criticism Power exists and is exercised within the law school but it is not necessarily exercised repressively or unjustly Power is what keeps the engine of legal education functioning

The second point to note about the Foucauldian notion of power is that it is *non-subjective* A discourse may privilege or favour certain subjects, and those subjects may appear to cooperate willingly in the achievement of the discourse's objectives, but it is not an exercise of power *by* those subjects.[47] Subjects are not the initiators of discourse, they are simultaneously the products of discourse and the means by which discourses are propagated This idea that the subject is created by discourse, rather than the other way around, is central to the Foucauldian theoretical framework According to Foucault, the notion of a subject who exists prior to language and is the origin of all meaning is an illusion [48] Vocationalism, then, is an exercise of power which *favours* particular individuals, groups and institutions but it is not a deliberate machination *by* those individuals, groups and institutions.

The following analysis of vocationalism as power is conducted in three steps [49] The first step is the identification of the systems of differentiations established by vocationalism which create the space within which power is exercised. The second step is the identification of the objectives pursued by vocationalism once power relations are brought into existence The third and final step is the identification of the strategies employed by vocationalism in the achievement of its objectives

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widespread If power were never anything but repressive, if it never did anything but to say no do you really think one would be brought to obey it? What makes power hold good what makes it accepted, is simply the fact that it doesn t only weigh on us as a force that says no, but that it traverses and produces things it induces pleasure forms knowledge, produces discourse It needs to be considered as a productive network which runs through the whole social body much more than as a negative instance whose function is repression : Michel Foucault, Truth and Power in James D Faubion (ed) Power: *Essential Works of Foucault 1954-1984 Volume 3* (London: Penguin 2002) 120

47 The word subject as used by Foucault has two senses: people are both subjects (self-conscious beings) but they are also subjected (power acts produce subjection): Foucault, above n 46

48 Michel Foucault *The Birth of the Clinic: An Archaeology of Medical Perception* (London: Tavistock, 1973) 172

49 Michel Foucault, The Subject and Power in James D Faubion (ed) *Power Essential Works of Foucault 1954-1984* (London: Penguin 2002)

A *Differentiations*

Vocationalism, as described in the first part of this paper, establishes three important differentiations The first differentiation is between *practical* and *theoretical* The undifferentiated body of knowledge about law is divided into two categories: practical legal knowledge and theoretical legal knowledge. Theoretical legal knowledge is abstract knowledge of little or no relevance to legal reality; practical legal knowledge is knowledge about what lawyers do and the way lawyers behave, and is of greater relevance to law students. Theoretical knowledge is merely abstract; practical knowledge is 'real' Theoretical knowledge is of little or no use to the profitability of a law firm, the efficacy of a legal system or the efficiency of an economy; practical knowledge enhances that profitability, efficacy and efficiency

The second key distinction is between *skilled* and *unskilled*. Those who can complete practical legal tasks – or who have demonstrated that they can do so by passing certain courses – are skilled; those who merely know the law are unskilled The standard by which the presence or absence of skill is judged is not the way these tasks *ought* to be performed but the way in which they *are* performed by legal practitioners.[50] A student is skilled if they can do what a practitioner can do, and the more skilled a law student becomes, the better the legal education is. Legal education that does not teach legal skills is deficient; a law degree which incorporates the teaching of skills is superior. A law student with legal knowledge but no legal skills is useless; a skilled law student is useful, desirable and, most importantly, employable.

The third differentiation, then, is between *employable* and *unemployable* According to vocational texts, an essential outcome of legal education is employability The student must be able to find a job, and to find a job the student must be acceptable and desirable to employers. Students are categorised, and categorise themselves, as either employable or unemployable, and law school practices are judged according to the extent to which they contribute to employability

The first term in each of these pairs of constructed categorisations is the one privileged by vocational discourse The practical, the skilled and the employable student is privileged over the theoretical, unskilled or unemployable student The law teacher who teaches practical legal knowledge, who inculcates practical legal skills, and who focuses upon

50 Stuart Toddington while acknowledging the relevance of legal skills, criticised vocationalism's failure to distinguish between what legal skills *ought to be* and what legal skills are as practised based upon an untheorised and uncritical confidence in the infallibility of the practitioner: Stuart Toddington Skills, 'Quality' and the Ideologies of Managerialism' (1994) 28(3) *Law Teacher* 243 255-256

providing to law students an education which will lead to enhanced employability is privileged over the law teacher who takes a more doctrinal, liberal or radical approach to the teaching of law Furthermore, the law school which emphasises and maximises employability as an outcome of its courses is superior to the law school which seeks to achieve other objectives. Law students, law teachers and law schools which do not prioritise practicality and employability, on the other hand, are criticised, marginalised, and categorised as abnormal

B *Objectives*

Vocationalism seeks to enhance the status of the vocational subject. The law student who focuses upon the development of practical legal skills and who is able to be employed by the most prestigious law firm is viewed as the superior student The law teacher who favours a more practical, skills-based approach to the teaching of law, by allying themselves with the practising profession, is able to emphasise the differences between the vocational approach and alternative approaches to teaching law, and to claim their superiority over other scholars The law school which emphasises vocationalism claims a higher status than those which take a more traditional or alternative approach, and uses this status to attract new students.[51]

Vocationalism, like all discourses, seeks to establish and enforce a regime of truth. The central notions of vocationalism – that practical knowledge is more important and more valuable than doctrinal or theoretical knowledge, that practising lawyers by definition know more about the reality of law than their academic counterparts, and that the primary purpose of tertiary education is to enhance the employability of graduates – are all subjective and contested assertions, but vocationalism insists that these notions are objectively valid and universally true

Vocationalism seeks the creation and maintenance of a productive and compliant legal workforce. It seeks to benefit practising lawyers, partners, and employers who desire the creation of a pool of employable graduates from which they can select their employees.[52] Vocationalism

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51 As demonstrated in the first part of this paper, many law schools promote themselves as having close connections with the local profession; law schools are ranked according to the percentage of graduates able to obtain employment within law firms and by word of mouth accorded status according to the selection choices of the most prestigious law firms

52 The US critical legal scholar Duncan Kennedy provocatively described legal education as training for hierarchy: Legal education structures the pool of prospective lawyers so that their hierarchical organisation seems inevitable, and trains them in detail to look and think and act just like all the other lawyers in the system : Duncan Kennedy, Legal Education as Training for Hierarchy in David Kairys (ed) *The Politics of Law A Progressive Critique* (New York: Pantheon Books 1990) 72

also seeks to benefit those government agencies which view tertiary education as one of the mechanisms by which an efficient and productive economy might be achieved[53] The law school is seen as a factory for the production of efficient legal workers, with both the learning of legal knowledge and the development of legal skills as important stages in the lawyer-manufacturing process. At the level of the law school itself, many law teachers and administrators willingly cooperate with employers and government agencies because of the perceived benefits of doing so. Employers and agencies 'reward' law schools by hiring their graduates thereby according them prestige, by providing sources of additional funds for the law school, by granting academics lucrative consultancies, and by generally improving the vocational academic's own employment and promotion prospects.

C *Strategies*

Each of the forms of vocationalism-as-knowledge identified in the first part of this paper is simultaneously a strategy by which the discourse seeks to achieve its objectives Vocational statements in legal education scholarship, in law school texts and in law school curricula propagate vocationalism, enhance the status of the vocational subject, universalise vocational knowledge, and promote the creation of a productive and compliant workforce. Other, more specific, ways in which vocationalism-as-power is exercised within the law school include compliance with admission requirements; the encouragement of close relations between the school and the practising profession; the provision of PLT courses and clinical legal education programs; the use of practising lawyers as guest speakers; and the moot court.

One of the most effective strategies employed by vocationalism-as-power is compliance with admission requirements.[54] The Uniform Admission Rules and the 11 areas of knowledge that law students are required to have studied successfully before they can be admitted to the

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53 According to Vivienne Brand law schools are increasingly viewed by government agencies as instruments of economic policy, to be assessed against benchmarks of community expectation and fiscal responsibility: Brand above n 38 115 In the 1987 Pearce Report, recent graduates were surveyed members of the profession were approached for comments, students were interviewed and an entire chapter of the summary report was devoted to the consumer s perspective : Pearce Campbell and Harding above n 24 Chapter 4 According to Brand, this move to a consumer-focussed review evidenced an underlying policy shift to a more economically rationalist framework within tertiary education in general and within law schools in particular: Brand, above n 38, 115-116

54 Sam Garkawe described the Uniform Admission Rules as an unwelcome and dangerous attempt by the judiciary to impose their limited and conservative view of legal education on all Australian law schools : Sam Garkawe Admission Rules (1995) 21(3) *Alternative Law Journal* 109 109

legal profession (the 'Priestley 11')[55] influence significantly the nature and characteristics of Australian legal education. While law schools are not compelled to offer all eleven areas of knowledge in their core curriculum, most schools nevertheless do so. This particular vocational strategy is most successful in the law schools established subsequent to the 1987 Pearce Report: given their need to maximise the employability of their graduates, most ensure that their compulsory curriculum includes the requisite areas of knowledge. Even where the eleven areas are not part of the core curriculum, the elective law subjects that are required for admission effectively become compulsory law subjects because the students who do not intend to practice law are usually aware that, should they later decide to practice, they would otherwise be required to pass additional courses. In order to avoid this, most students prefer to take the eleven areas of knowledge during their university education, ensuring that the majority of law students in Australia spend much of their time at law school studying vocational law subjects. Non-vocationally oriented students are disciplined to focus upon their own employability, and students who are already concerned about their employment prospects are encouraged to become even more concerned.[57]

Another effective tactic employed by vocationalism within the law school is the establishment and maintenance of close relations between the law school and the practising profession, enabling the profession to exert significant control over the form and content of the law degree, ensuring it maintains a vocational emphasis. Practitioners contribute to course planning, judges and senior practitioners contribute to academic teaching and writing, and an increasing proportion of full-time academics have recent or current professional experience.[58] Law firms are regularly invited to sponsor events such as mooting competitions, academic prizes, scholarships and law school functions. The employers are thereby placed in positions where they have the authority to be able to influence the general direction, if not the specific content, of the law school curriculum. The shift away from public funding and towards private funding of law schools has given the practising profession an

55 Contract Law, Tort Law, Real and Personal Property Law, Equity (including Trusts), Criminal Law and Procedure, Civil Procedure, Evidence, Professional Conduct (including Basic Trust Accounting), Administrative Law, Federal and State Constitutional Law, and Company Law.

56 Garkawe, above n 54, 110.

57 Andrew Goldsmith, 'Warning: Law School Can Damage Your Health!' (1995) 21 *Monash University Law Review* 272.

58 Charles Sampford and Suzanne Condlln, 'Educating Lawyers for Changing Process' in Charles Sampford, Sophie Blencowe and Suzanne Condlln (eds) *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999) 194; Andrew Stewart, 'Educating Australian Lawyers' in Charles Sampford, Sophie Blencowe and Suzanne Condlln (eds) *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999) 146.

opportunity to exercise even more influence upon the law school and its curriculum. The fact that law firms are providing the money to fund some of the law school's activities obliges the law school administrators to take heed of the profession's demands.

The Johnstone Report confirmed that the practice of consulting the legal profession regarding the form and content of the law degree is still common.[59] At many law schools, members from the legal profession are invited to join committees responsible for overseeing the curricula, advisory boards or review teams. At some schools, the Dean or Head of School sees it as part of their duties to liaise with the profession.[60] Most schools informally seek views from employers,[61] and some law schools engage in the practice of conducting formal surveys of the profession.[62] At one law school, the Dean meets regularly with major firms

> just simply to let them know where we're going, what we're doing, what are the developments in the Law School and to find out from them what their perceptions are. Whether they think our students are good. Whether there are problems we should be attending to. Whether they have needs that we haven't anticipated yet that they would like us to contribute to.[63]

A third strategy used by vocationalism to achieve its objectives is the offering of PLT courses and clinical legal education ('CLE') programs by the law school. PLT is an explicit effort to train students as future practitioners and is exercised expressly to accord with the perceived needs of employers. Traditionally, the practising profession was itself responsible for the skills based education of law graduates by way of articles of clerkship. Because this training took place within the law firm, the employers were able to exercise almost absolute control over the nature and direction of this training. From the early 1970s, dissatisfaction with the standards of training under articles of clerkship prompted the introduction of institutional PLT courses in several States, usually in lieu of, but sometimes as a supplement to, articles of clerkship.[64] When law schools began to take on the responsibility for PLT, they had to demonstrate that their courses were at least the equivalent of articles of clerkship in terms of the inculcation of legal skills, with the consequence that the nature and focus of these courses were still largely controlled by the practising profession. The nature and character of most Australian

59 Johnstone and Vignaendra, above n 1, 227.
60 Johnstone and Vignaendra, above n 1, 246.
61 Johnstone and Vignaendra, above n 1, 230.
62 Johnstone and Vignaendra, above n 1, 230.
63 Johnstone and Vignaendra, above n 1, 233.
64 PLT is today offered by Australian National University, Bond University, Flinders University, Griffith University, Monash University, the University of Newcastle, the University of Queensland, Queensland University of Technology, the University of Tasmania, the University of Technology Sydney, the University of Western Sydney and the University of Wollongong.

PLT courses are today influenced by the national organisational body, the Australian Professional Legal Education Council, and individual PLT educators' and practitioners' articles published in the *Journal of Professional Legal Education*.[65] However the emphasis is still upon teaching those legal and generic skills which will be most useful for legal practice. Some law schools have even elected to integrate PLT into the LLB program, a strategy which further facilitates the creation of employable graduates. Similarly, this objective is sought to be achieved by the incorporation of CLE into the law degree and the placing of law students into 'real' working environments.[66] Law schools also give students vocational experience through placements in legal centres, legal practices and other kinds of workplace.[67]

Another common strategy employed by vocational discourse is the use of the practising lawyer as guest lecturer. There was a time when all lectures were delivered by practising lawyers. This changed with the development of the full-time academic lawyer following World War II, but recent years have seen a shift back towards having classes taught by practising lawyers, at least in their capacity as guest lecturers. Some law schools promote themselves as offering courses taught by professionals, implying that such courses have more credibility than those offered by the academic lawyers. In teaching classes themselves the practising lawyers exercise an even greater degree of control over the content of the law course and ensure that the focus is upon practical aspects of the law, law as it is 'really practised'.[68]

One vocational strategy persisted even during vocationalism's decline: the mock trial or 'moot'.[69] Moots have been an element of Western legal

65 Sharon Hunter-Taylor, 'Professional Legal Education: Pedagogical and Strategic Issues' (2001) 3 *University of Technology Sydney Law Review* 59, 61-62.

66 These programs have been running in Australia since 1970, initially within the law school itself and later at clinics such as the Springvale Legal Service, the Doveton Legal Service and the Monash-Oakleigh Legal Service: Jeff Giddings, 'A Circle Game: Issues in Australian Clinical Legal Education' (1999) 10(1) *Legal Education Review* 33, 39-40.

67 Giddings, above n 66, 37. The Johnstone Report recently concluded that the clinical legal education movement in Australia is still very small: Johnstone and Vignaendra, above n 1.

68 Vivienne Brand wrote: 'As to who does the teaching of these new university-based practical subjects, the increased focus on practical legal skills teaching is likely to generate greater reliance on use of part-time teaching staff drawn from practice or on full-time staff recruited from a background as practising lawyers. At least in the case of the two South Australian universities offering this combined program, the Law Society will assist in the teaching of certain subjects. The shifting of ground back to a more heavily profession-dominated degree is immediately apparent, with implications for the relationship between reform in teaching and the satisfaction of employer-body demands': Brand, above n 38, 127.

69 Lynch noted that '[t]he only apparent reasons for the existence of mooting programmes are tradition and the correlation to the realities of professional practice': Andrew Lynch, 'Why Do We Moot? Exploring the Role of Mooting in Legal Education' (1996) 7 *Legal Education Review* 67, 68.

education since medieval times, and the essential characteristics of the moot have changed little since then: students assume the roles of advocates before a simulated bench; argue points of law arising from a hypothetical scenario; and answer questions from the bench relating to the arguments presented.[70] Most Australian law students are still given the opportunity, if not obliged, to participate in moots,[71] and national and international mooting competitions between law schools have become popular and prestigious. The moot is often promoted as one of the most important experiences in the life of the law student, with the implication that the exercise of 'real' legal expertise in the preparation and delivery of an argument is of greater importance than merely learning about or critiquing such practices in class, and that the ultimate goal of learning the law is to be able to practise it.

IV Conclusion

Vocationalism may have been the first discourse to dominate Australian legal education but for much of the second half of the twentieth century it was marginalised by doctrinal and liberal approaches to the teaching of law. In recent years, however, there has been a resurgence, and vocationalism is once again a dominant discourse in the law school. The preferences of law teachers, the expectations of students, and pressures from the profession, the university and government agencies have converged to ensure that the teaching of legal skills, deference to legal practice and the prioritisation of employability have become central concerns for law schools in Australia. Many law schools have incorporated the teaching of practical skills into their teaching policies and programs, promote themselves as maintaining close relations with the local profession, and emphasise the 'success rate' of their graduates in finding employment with prestigious law firms. According to the Johnstone Report and its survey of 27 of the 28 Australian law schools, 11 law schools now explicitly distinguish themselves as a professional law school or as having an orientation to the profession, and 13 law schools distinguish themselves as having a focus on legal skills in the curriculum.[72] Law students are increasingly obliged to learn to *do*, and in so learning becomes more useful to their employers and to the community. Employment has became the primary objective for law

70 Lynch above n 69 68.70

71 *Moots* is offered as an accredited subject or subjects at the University of Adelaide James Cook University. Griffith University the University of Melbourne, Monash University the University of New England the University of Northern Territory the University of Notre Dame the University of Queensland, Queensland University of Technology. the University of Sydney the University of Tasmania the University of Technology Sydney and the University of Western Australia

72 Johnstone and Vignaendra above n 1 26-29

schools, law teachers and law students, and this objective determines what is taught, how it is taught and how students are assessed

Vocational legal education is a part of the complex disciplinary mechanism which seeks to ensure that the political, social and cultural status quo within the community is maintained This status quo favours employers by allowing them to occupy positions of institutional, political and economic privilege, and vocational legal education seeks to ensure that the present privilege is retained Individual graduates may of course eventually become employers themselves, but the hierarchical relationships between employers and employees, between employers and educational institutions, and between the State and educational institutions are nevertheless retained and reinforced. Liberal and radical approaches to the teaching of law have the potential to undermine these hierarchies; vocationalism competes with and strives to marginalise these alternative discourses in order to ensure that legal education remains a process which enhances an employee's ability and productivity but which does little to threaten the stability of extant social structures